Supreme Court, U.S.
FILED

No. 01-1414 MAR 19 2002

OFFICE OF THE CLERK

In The

Supreme Court of the United States

JALIL GAZIR SUED JIMENEZ, ELGA CASTRO, ELLIOT CASTRO, ERIKA FONTANEZ, LILLIANA GARCIA ARROYO, ALICE AGOSTO HERNANDEZ, ROBERTO BARRETO VALENTIN, MARITZA GARCIA ARROYO, NESTOR CRUZ CRESPO, JOS MAYOL SEPULVEDA, ROBERTO A. GANDARA BARNETT, OMAR GOMEZ COURVERTIER, JOSE F. FLORES ARRIAGA, RAMON DIAZ RIVERA, UBALDO ROSARIO NIEVES, ISRAEL TORRES LLAURADOR, NORMA LUGO MALDONADO, JOSE PEREZ GONZALEZ, JOSE LUIS ROMERO BURGOS, CARLOS TAINO DAVILA REVERON, JUAN BUDET MELENDEZ, EDWIN RIVERA, NORMA RODRIGUEZ FERRAN, MIGUEL RIVERA GONZALEZ, TUBAL PADILLA GALEANO, RUFINO ECHEVARRIA RIVERA, EFRAIN FIGUEROA BAEZ, ALFREDO COLON MELENDEZ, BLANCA GARI PEREZ, PEDRO JOSE MUNIZ GARCIA, NESTOR NAZARIO TRABAL, JULIO ORTEGA MIRANDA, REINAND ORTIZ FELICIANO, JOSE RIVERA SANTANA, ZORAIDA SANTIAGO FELICIANO, ASUNCION RODRIGUEZ CRESPO, ERNESTO PEÑA CARAMBOT, AND ROSALINDA SOTO TOLEDO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

José J. Nazario de la Rosa
Fermín L. Arraiza Navas

867 D. Cabrera St. – Santa Rita
San Juan, P.R. 00925
Tel: (787) 758-0315
Fax: (787) 756-0315

Pedro J. Varela
Counsel of Record

HC-44, Box 13470
Cayey, P.R. 00736
Tel: (787) 738-5345

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

74pp

QUESTIONS PRESENTED

(1) This case involves an issue left open in *United States v. Cannabis*, No. 00-151, May 14, 2001, that is whether or not the necessity defense is relevant in the specific factual circumstances, and the Court should have allowed the Petitioners to call their expert witnesses during trial, after more than 60 years of military maneuvers and experiments with depleted uranium and other non-conventional weapons which have been jeopardizing the lives and health of the Viequenses.

(2) Whether or not the U.S. District Court erred by not allowing Petitioners to discover from the Government all the information concerning the use of non-conventional weapons in the Vieques' Live Impact Area and violates Petitioners' right to due process of law and to have a fair trial.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iii

Opinions Below 1

Jurisdiction 1

Statutes Involved 1

Statement of Case 2

Argument 8

Appendix ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. Manzo, 380 U.S. 545 (1965) 8

Balzac v. People of Porto Rico, 258 U.S. 298 (1922) 15

Barcelo v. Brown, 478 F. Supp. 646 (D.P.R. 1979) 2

Calero Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) 15

Califano v. Torres, 435 U.S. 1 (1978) 15

Chambers v. Mississippi, 410 U.S. 284 (1973) 18

Dorr v. United States, 195 U.S. 138 (1904) 15

Examining Board v. Flores Toledo, 426 U.S. 572 (1976) 15

Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) 20

Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829) 20

Harris v. Rosario, 446 U.S. 651 (1980) 15

Igartúa de la Rosa v. United States, 229 F.3d 80 (1st Cir. 2000) 15, 16, 17

In re Oliver, 333 U.S. 257 (1948) 8

Mora v. Mejias, 206 F.2d 267 (1st Cir. 1953) 15

People v. Lovercamp, 43 Cal. App. 3d 823 (1974) 9

The Paquete Havana, 175 U.S. 677 (1900) 20

Torres v. Puerto Rico, 442 U.S. 475 (1979) 15

United Staets v. Saadé, 652 F.2d 1126 (1st. Cir 1981) 2

United States v. Bidwell, 182 U.S. 244 (1901) 15

TABLE OF AUTHORITIES – Continued

Page

United States v. Cassidy, 616 F.2d 101 (4th Cir. 1980) 8

United States v. Hill, 893 F. Supp. 1044 (1994)..... 8

United States v. Nixon, 94 S. Ct. 3090 (1974) 19

United States v. Parrilla Bonilla, Judith Berkan, 648 F.2d 1373 (1st Cir. 1981) 2

United States v. Schoon, 971 F.2d 193 (9th Cir. 1991) ..9, 11

United States v. Bailey, 444 U.S. 394 (1980).....9, 14

United States v. Duclos, 214 F.3d 27 (1st Cir. 2000) 11

United States v. Maxwell, ___ F.3d___, No. 00-2084; decided 29 June 2001 (1st Cir. 2001) 10, 12, 13

United States v. May, 622 F.2d 1000 (9th Cir. 1980) 12

United States v. Newcomb, 6 F.3d 1129 (6th Cir. 1993)..... 11

United States v. Oakland Cannabis Buyers Coop., ___ U.S. ___, No. 00151, May 14, 2001 9

United States v. Seward, 687 F.2d 1270 (10th Cir. 1982)..... 11

United States v. Turner, 44 F.3d 900 (10th Cir. 1995) 11

United States v. Zenon, 800 F.2d 269 (1st Cir. 1986) 2

Vieques Conservation and Historical Trust v. Bush, 140 F. Supp. 2d 127 (D.P.R. 2001) 3, 7

Washington v. Texas, 388 U.S. 14 (1967) 8

Water Keeping Alliance, et al. v. Department of Defense, 140 F. Supp. 2d 127 (D.P.R. 2001)..... 7

Webb v. Texas, 409 U.S. 95 (1972)..... 8

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CONSTITUTION

V, VI, and XIV amendments 1, 19, 20

STATUTES AND REGULATIONS

18 U.S.C. sec. 1382 ..... *passim*

28 U.S.C. sec. 1258 1

32 C.F.R. sec. 770.34-40 2

International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171, entered into force, March 23, 1976. 1

Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force, June 26, 1987..... 1

International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force, Jan. 4, 1969 2

Universal Declaration of Human Rights 2

LAW REVIEW ARTICLES

David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 Yale Journal of International Law 129, 191 (Winter-1999)..... 21

L. Shulkind, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. Law Rev. 79 9

TABLE OF AUTHORITIES – Continued

Page

RULES

Rule 17(c) of the Federal Rules of Criminal Procedures 19

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the First Circuit is cited as 275 F.3d 1 (1st Cir. 2001) and is reprinted in the appendix at App. 1. The Judgments from the United States District Court for the District of Puerto Rico are reprinted in the appendix at App. 17 to 43.

JURISDICTION

This is a Petition for Writ of Certiorari from a Judgment of the United States Court of Appeals for the First Circuit, which affirmed several convictions and sentences of the United States District Court for the District of Puerto Rico, for alleged violations committed under 18 U.S.C. sec. 1382. This Court has jurisdiction to review this case pursuant to 28 U.S.C. sec. 1258.

STATUTES INVOLVED

Constitution of the United States of America, Amendments V, VII, XIV

International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171, entered into force, March 23, 1976

Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force, June 26, 1987.

International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force, Jan. 4, 1969

Universal Declaration of Human Rights

18 U.S.C. sec. 1382

32 C.F.R. sec. 770.35-40

STATEMENT OF CASE

Vieques is an island municipality of Puerto Rico. It lies 8 miles southeast of the bigger island that is called Puerto Rico. During World War II, in 1941, the U.S. Navy began a process to assume control over Vieques.

Although the Viequenses' life has been totally determined by war-related activities, people engage in non-violent actions in defense of their human rights in order to protect their health and life. See *United States v. Zenon*, 800 F.2d 269 (1st Cir. 1986); *United States v. Saadé*, 652 F.2d 1126 (1st Cir. 1981); *United States v. Parrilla Bonilla, Judith Berkan*, 648 F.2d 1373 (1st Cir. 1981); *Barcelo v. Brown*, 478 F. Supp. 646 (D.P.R. 1979).

The Present Situation:

On April 19, 1999, a civilian worker was killed at a Navy observation post in Vieques. People began to occupy and set up civilian encampments in otherwise military occupied areas. This movement lasted from April 21, 1999 until May 4, 2000.

A special commission on Vieques was appointed by the former Governor of Puerto Rico, which recommended

the immediate demilitarization of Vieques, the decontamination of the area, the return of the presently occupied land to the people and the development of Vieques.

On January 31, 2000 former United States President William Jefferson Clinton issued a presidential directive which allows the military training to be conducted in Vieques at least until May 2003.

As soon as May 6, 2000, the Navy announced that they had resumed the military exercises. An Injunction and a Temporary Restraining Order were filed before the district court in Puerto Rico in case no. 00-1578. The TRO petitions were rejected by the court on May 12, 2000. *Vieques Conservation and Historical Trust v. Bush*, 140 F. Supp. 2d 127 (D.P.R. 2001).

Moreover, the Presidential directives have not been implemented by Congress. See 106th Congress 2d Session, H.R. 5408 and the elimination of the Referendum programmed to be held on February 2002 in Vieques, which is mentioned by the U.S. Court of Appeals in its Judgment, footnote number 2.

After having exhausted all available and reasonable remedies to stop the bombardments, several groups of citizens penetrated into the Live Impact Area (L.I.A.) to serve as human shields. Petitioners were arrested in their way to the Live Impact Area in order to interrupt the deadly bombardments. The intentions of the U.S. Navy to resume military maneuvers as well as the order from the district court on April 8, 2000, denying the third T.R.O. were of public knowledge.

The Trials:

During trials, the Petitioners announced the witnesses in support of their necessity motion. The request of the defense was denied by the district judges. The district judges denied Petitioners' defenses even before listening to the proffer.

Moreover, the documents requested by the defense regarding the use of non-conventional weapons in the L.I.A. in Vieques were denied by the district court and the court of appeals. After the U.S. Attorneys finished with their evidence the defense counsel made the following proffer:

(a) Francisco Jiménez, a nuclear engineer, would have testified about his written report concerning the level of radiation that he measured in the L.I.A. of Camp García in Vieques. He measured different sites in the L.I.A. that showed a high level of radiation due to the use of bullets with depleted uranium. This study demonstrates that the U.S. Navy has been using this type of munitions in Vieques, in different sites and occasions and not only in one isolated incident, as the Navy has accepted.

(b) Dr. Neftalí García, a chemist who has made several studies in Vieques concerning the level of contamination that exist in the L.I.A. as a result of the military maneuvers of the U.S. Navy. In his report he concluded that several kinds of heavy metals and other toxic substances were present in the samples analyzed in his study.

(c) Rafael Cruz Pérez, an engineer who has made several studies regarding the dispersion of contaminants

in Vieques, would have testified about his studies which confirm that the heavy metals found in the L.I.A. of Vieques have reached the civilian population. High concentrations of these heavy metals were found in the water tanks used by the civilians in Vieques.

(d) Arturo Massol Deyá, who has a Ph.D. in Microbial Ecology from the NSF Center for Microbial Ecology from the Michigan State University would have testified about the results of his studies, made in Vieques' soil, where he concluded that several contaminants including several heavy metals are present in plants and the food-chain (fishes, crabs, vegetables). Among the contaminants cadmium, lead, manganese and cobalt are present.

(e) Dr. Carmen Ortiz Roqué, M.D., M.P.H., M.S., is an epidemiologist who would have testified about an ongoing study concerning the health hazards for the Viequenses of different concentrations of heavy metals in their body and its relation to the Navy practices.

(f) Rosalie Bertell, an epidemiologist from Canada with more than 30 years of experience dealing with persons contaminated with radiation, would have testified about the dangers of depleted uranium to humans. An offer was made also regarding Ph.D. Cruz Maria Nazario regarding the growing cancer rate in Vieques and the growing rate in deaths because of cancer since 1975, date in which the U.S. Navy moved its military operations from Culebra (another island) to Vieques. Rosalie Bertell would have also testified that even the traffic of vehicles can disrupt the dust from the roads producing radioactive materials that are brought up to the air with the danger of being inhaled by humans.

The witnesses were not allowed to testify. The necessity defense is based precisely on these expert testimonies which constitute the factual bases to establish the defense itself. Therefore, its denial constitutes a violation of the right to due process of law and to present a defense fully in a criminal case as well as to their right to a fair and impartial trial.

The Cases on Appeal:

Petitioners, whose cases were consolidated for purposes of appeal in the United States Court of Appeals for the First Circuit, were arrested at various times between April and June 2000 by U.S. Navy security officers in Vieques, Puerto Rico. On different days trials were conducted. Petitioners allege that the Navy's activities in Vieques, including live-fire artillery, bombardments and experiments with bullets with depleted uranium and other non-conventional weapons, are causing civilian deaths, serious health threats to Vieques' residents and environmental damages. Petitioners were found guilty for trespassing into Camp García Naval Installation in order to stop such deadly military activities.

Petitioners filed a Notice of Appeal and their respective Briefs in their cases before the U.S. Court of Appeals for the First Circuit. These cases were consolidated and after oral hearing was held on November 7, 2001. The court of appeals affirmed the judgments and sentences of the district court on December 19, 2001.

During the oral hearing Appellants argued that these cases are not mere trespassing cases under 18 U.S.C. sec.

1382, but cases about the right to self-defense of a whole population, a right that has been exercised in a peaceful way in order to protect the health and life of the Viequenses, who have been subject to gross violations of human rights by the U.S. Navy for more than six decades.

Scientific evidence has been gathered and published on the harm to the health and life done to the Viequenses by the bombs (corroborated this information by the admission of the U.S. Navy itself regarding the experiments conducted in Vieques with depleted uranium and other non-conventional weapons) and by the high and increasing rate of cancer in this island.

When Petitioners were arrested in Vieques, close to the live impact area, the shooting and the bombing was actually going on. The Viequenses had exhausted all reasonable legal alternatives to halt the bombings including four requests for temporary restraining orders which have been denied by the U.S. District Court in Puerto Rico and Judge Kessler from the Washington D.C. District Court. *See Vieques Conservation and Historical Trust v. Bush*, 140 F. Supp. 2d 127 (D.P.R. 2001) and *Water Keeping Alliance, et al. v. Department of Defense*, 140 F. Supp. 2d 127 (D.P.R. 2001).

Moreover, this is not an issue that could be solved by sending letters to the U.S. President or the U.S. Congress but about the real and reasonable alternatives these people had to stop the deadly bombings that were going on.

Contrary to other cases of civil disobedience, this is not a case of a mere protest. Camp Garcia is not an ordinary military base. It is a military base with a target

range that lies only 8 miles away from the civilian population, where the U.S. Navy and members of the NATO forces have been testing depleted uranium and other non-conventional weapons, including chemical and bacteriological weapons, jeopardizing the health and lives of the Viequenses. Therefore, people do not trespass just to protest as in other cases, *see, e.g., Schoon, infra,* which were extensively quoted by the Government.

Consequently, Petitioners have been between defending the most basic human rights of the residents of Vieques.

ARGUMENT

The constitutional right to due process of law guaranteed by the Fifth, Sixth, and Fourteenth Amendments requires that defendants have the opportunity to present their defenses fully. *Chambers v. Mississippi,* 410 U.S. 284 (1973); *Webb v. Texas,* 409 U.S. 95 (1972); *Washington v. Texas,* 388 U.S. 14 (1967); *In re Oliver,* 333 U.S. 257 (1948). In *Washington v. Texas,* this Court held that the accused has a due process right to present his own witnesses to establish a defense. It has been also recognized that defendants should have full opportunity to present evidence in furtherance of proper and recognized legal defense theory. *United States v. Hill,* 893 F. Supp. 1044 (1994); *United States v. Cassidy,* 616 F.2d 101 (4th Cir. 1980). The basic constitutional right to present a defense applies with equal force whether the trial is before a judge or a jury. *Armstrong v. Manzo,* 380 U.S. 545 (1965);

L. Shulkind, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. Law Rev. 79. Implicit in the concept of a meaningful defense is the right to be heard by the trier of fact. *See People v. Lovercamp*, 43 Cal. App. 3d 823 (1974).

In this case, Petitioners have a constitutional right to present a defense, including an affirmative defense. As a consequence, Petitioners should have been allowed to present the necessity defense. In *United States v. Schoon*, 971 F.2d 193 (9th Cir. 1991), the Ninth Circuit notes that attempts to invoke the necessity defense should be denied only when the "offer of proof is insufficient as a matter of law to support the proffered defense". The credibility to be accorded to such a proposed defense lies solely within the function of the trier of fact and is to be determined by the facts and circumstances of each case as they arise.

This case presents an issue that was left open by this Court in *United States v. Oakland Cannabis Buyers Coop.*, ___ U.S. ___, No. 00151, May 14, 2001, to wit, whether necessity can ever be a defense when the federal statute in question does not provide for it. In this case 18 U.S.C. sec. 1382, trespass by hundreds of civil disobedients in a military installation bombarded by the Navy for the past sixty years in the municipality of Vieques, Puerto Rico. Petitioners contend that federal courts have authority to recognize a necessity defense not provided by the statute herein involved. *See, e.g., United States v. Bailey*, 444 U.S. 394, 410 (1980). This defense must be especially recognized in the situation of Vieques, where Petitioners have exhausted all available means, judicial, legislative and otherwise, to present their opposition to the bombardment of Vieques by the Navy, which has caused great

physical and mental damages to its inhabitants in the past six decades.

Petitioners at trial tried to present what has been dubbed in recent cases a "necessity defense" or a "state of necessity defense" as a collateral branch of the common law doctrine of necessity as a justification of defense to a criminal charge. At present the courts deal with this defense under the doctrine of "direct civil disobedience" which justifies, and "indirect civil disobedience" which does not.

For once, clarity and conciseness is better achieved if we state the law, generally, before the facts. Particularly, since the Judgment of the U.S. Court of Appeals for the First Circuit directed the Petitioners to show why the proposed defense would not be disposed of under *United States v. Maxwell*, ___ F.3d ___, No. 00-2084; decided 29 June 2001 (1st Cir. 2001).

Maxwell, it would seem, favors rather than bars the proper presentation of a necessity defense, to defeat a prosecution in this case. At footnote 2 the court of appeals noted: "We assume instead, favorably to Maxwell, that necessity, if proven might constitute a defense to a charge lodged under section 1382". Slip Op. at p. 2. This Honorable Court there explicitly decided that: "The question before us is not whether necessity ever can be a proper defense to a section 1382 charge in the proper context but, rather, whether Maxwell showed that he could muster some evidence of a viable necessity defense." Slip Op. at p. 2.

In a general statement about the necessity defense, this court of appeals stated in *Maxwell* that:

> "A necessity defense, like other justification defenses, allows a defendant to escape responsibility despite proof that his actions encompassed all the elements of a criminal offense. See *United States v. Duclos*, 214 F.3d 27, 33 (1st Cir. 2000). The necessity defense requires the defendant to show that he (1) was faced with a choice of evils and chose the lesser evil, (2) acted to prevent imminent harm, (3) reasonably anticipated a direct causal relationship between his acts and the harm to be averted, and (4) had no [reasonable] legal alternative but to violate the law. *See United States v. Turner*, 44 F.3d 900, 902 (10th Cir. 1995); *United States v. Schoon*, 971 F.2d 193 (9th Cir. 1992) at 195."

Slip. Op. at p. 7. The Court then proceeded to examine Maxwell's proffer under each heading and found that the evidence proffered failed to meet the standard required to be allowed to present evidence on his defense of necessity.

Immediacy: Maxwell's assertion that the deployment of Trident submarine with nuclear armament in waters near Puerto Rico, assumed arguendo to be correct by the Court, failed because: "After all, the term 'imminent harm' connotes a real emergency, a crisis involving immediate danger to oneself or to a third party. *See United States v. Newcomb*, 6 F.3d 1129, 1135-1136 (6th Cir. 1993); *United States v. Seward*, 687 F.2d 1270, 1276 (10th Cir. 1982). Slip Op. at p. 7. The court of appeals found no evidence on the record to prove (1) the dangerous presence of a Trident, or (2) that the 'mere presence of such a vessel, without some kind of realistic threat of detonation, would suffice to pose an imminent harm.' " Slip Op.

at p. 8; using as an example *United States v. May*, 622 F.2d 1000, 1008-09 (9th Cir. 1980).

Petitioners at bar engaged in direct civil disobedience to stop the ongoing bombardment of Vieques which, whether with live ammunition, inert bombs, bullets with depleted uranium, chemical, bacteriological or other non-conventional weapons could not be more immediate. A trespass, if that it was, is much the lesser of two evils when compared to the continued and incremental wrongs inflicted on a civilian population, as we have showed in the Appellants' Brief and the *Memorandum of Law* . . . submitted for the consideration of the district court and the court of appeals. Immediacy in this case is beyond argument: the bombing was going on and the lands in Vieques highly polluted by the war activities of the United States.

Causality: Reasonable Anticipation of Averting Harm: "A defendant must demonstrate cause and effect between his or her actions and the achievement of the goal of the actions taken by competent evidence." *Maxwell*, Slip Op. at p. 8. However reasonable the court of appeals' skepticism about the displacement of Trident submarines because of Maxwell's entry upon Camp García grounds, the case of Petitioners in this case is entirely different. The presence of civilians within the firing range (L.I.A.) can and does interrupt the bombardment of Vieques by the Navy, as admitted by Navy personnel and most recently by the new Secretary of the Navy Gordon England. That is precisely the main reason why the U.S. District Court has been increasing sentences in the Vieques' cases. This was a weak argument used by the court of appeals to affirm the district court's decisions in these cases.

There is no doubt from the records in these cases that every time a civilian enters the life impact area of Camp García, the Navy has to stop all its bombardments activities in the zone. This requirement has been established in all cases through the proffer made by the attorneys; evidence that has not been allowed during trial. If something is crystal clear in all these cases, it is that Petitioners have been serving as human shields, interrupting the bombardments constantly for more than a year. Neither this proffer nor the imminent harm to which the Viequenses are exposed has been rebutted by the Government or the Navy personnel during trial.

Reasonable Legal Alternatives: "To succeed on a necessity defense a defendant must show that he had no [reasonable] legal alternative to violating the law. This makes perfect sense: the necessity defense does not arise from a defendant's choice of a preferred course of action (some legal, some not), but from an emergent crisis that, as a practical matter, precludes all principled actions but one." *Maxwell*, Slip Op. at p. 9, citations omitted. This seems, and is not, a sufficient statement of a legal principle. The court of appeals remits the Petitioners to a political process which is admittedly not accessible to them.

The main difficulty with the court of appeals' referral of the Petitioners to the political processes is, however, that such an alternative contradicts this Court's own definition of the defense. The defendant's choice must be understood as made at the time of "a real emergency, a crisis involving immediate danger to oneself or to a third party". *Maxwell*, Slip Op. at p. 7; emphasis added. The defendant's choice must be made ***hic et nunc***. In the

axiomatic case of the prisoner who is justified in escaping a burning jail, the law cannot and does not refer the defendant to the possibility, past or future, of filing a prison conditions case or petitioning the sheriff for a better jail.

The court of appeals even mentioned the referendum scheduled by the U.S. Congress for February 2002. See footnote 2 of Judgment, 19 December 2001. As we stressed during the oral audience held in San Juan, Puerto Rico on November 7, 2001, the proposed referendum to be conducted by the U.S. Navy on February this year was uncertain and finally it was eliminated by Congressional action. This was another of the unreal alternatives proposed by the U.S. Court of Appeals in its Judgment of December 19, 2001. However, it is important to stress here that the Government of Puerto Rico held a referendum in Vieques on July 29, 2001 and 70% of the voters democratically chose the immediate cessation of all military activities in Vieques.

The issue is, did the Petitioners have an alternative then and there to stop the bombing? The answer is no. In *United States v. Bailey*, 444 U.S. 394 (1980), this Honorable Court included in the necessity defense requirements the exhaustion of all "reasonable" legal alternatives in order to avoid an imminent harm. Therefore, the court of appeals erred while stressing that herein Petitioners had to demonstrate "an exhaustion of all legal options." This is not required by the case law.

Not only Petitioners, but also the Puerto Rican Government and the civil society have made efforts directed to stop the imminent harm in different forums, including

the U.S. courts, administrative agencies, the above mentioned referendum and even lobbying in the U.S. Congress, without success. The only conclusion is that the alleged alternatives proposed by the court of appeals are short of reasonable and do not respond to the reality of the political and juridicial relations of Puerto Rico and the United States.

We will only pause here to discuss the referral to the political processes. It is not only that Puerto Ricans have no power to elect Representatives and Senators to the Congress. Neither do we have any participation whatsoever in the election of the President, the Navy's Commander in Chief, nor do we have any legitimate authority to nominate or advise and consent to appointments in the federal Judiciary at any level. *See Calero Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *Examining Board v. Flores Toledo*, 426 U.S. 572 (1976); *Torres v. Puerto Rico*, 442 U.S. 475 (1979); *Califano v. Torres*, 435 U.S. 1 (1978); *Harris v. Rosario*, 446 U.S. 651 (1980); *United States v. Bidwell*, 182 U.S. 244 (1901); *Dorr v. United States*, 195 U.S. 138 (1904); *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922); *Mora v. Mejias*, 206 F.2d 267 (1st Cir. 1953). The repeated supplications, personal and collective, made to federal authorities to stop the torments inflicted on the people of Vieques and Puerto Rican society by the misuse of our territory have been ignored. "In every stage of these Oppressions We have Petitioned for Redress in the most humble terms. Our repeated petitions have been answered only by repeated injury." Declaration of Independence (1776).

In *Igartúa de la Rosa v. United States*, 229 F.3d 80, 85-90 (1st Cir. 2000), Chief Judge Torruella, the same one who

wrote the December 19, 2001 Judgment herein challenged, concurred in the court of appeals' Judgment "because I believe it to be technically and, as the law now stands, legally correct in its conclusion that the Constitution does not guarantee United States citizens residing in Puerto Rico the right to vote in the national Presidential election". *Igartúa*, 229 F.3d at p. 85. That technically and "legally" correct decision, however, is accepted by the Chief Judge in obedience. He then shows the undemocratic and moral shallowness of the decision within the historical and political context of Puerto Rico-United States relations. Since the Treaty of Paris of 1898, "The United States has [. . .] exercised almost unfettered power over Puerto Rico and the nearly 4,000,000 United States citizens who currently reside there." *Ibid.* "Undoubtedly the most glaring evidence of this egregious disparity is the fact that they do not elect a single voting representative to a federal government that exercises almost absolute power over them." *Igartúa*, at p. 86; footnote omitted in each prior quote.

And after a detailed examination of the actual meaning of Puerto Rico-United States relations and citizenship, the Chief Judge protests that:

> "The present conundrum cannot be justified or perpetuated further under the subterfuge of labeling it a 'political question'.[. . .] But in the final analysis this problem is no more political than that presented to and resolved by the Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), one that required, corrective judicial action even in the face of longstanding legal precedent."

Igartúa, 229 F.3d at 88-89. The sober, restrained language of this opinion cannot hide the moral and political indignation which it expresses. It is useless, short of errant cynicism to refer the Petitioners to political processes intended to control or redress the Navy's doings. Bombing Vieques violates all the catalog of individual and collective human rights internationally recognized and one basic political and ethical principle on which the United States must exist: "Governments are instituted among men, deriving their just powers from the consent of the governed." *Declaration of Independence*.

Discovery as to use of non-conventional weapons: The court of appeals rejected the request of Petitioners concluding that it was not relevant to the case due to the fact that Petitioners could not establish the other elements of the defense, which is incorrect. Before the court of appeals addressed the issue concerning the availability of legal alternatives, it was paramount to analyze the information requested by Petitioners (at least in chambers) regarding the use of non-conventional weapons in Vieques. As we stressed in our motions to the inferior courts, the concept of non-conventional weapons includes not only the bullets with depleted uranium, which the Navy admitted were used in Vieques, but also other radioactive, chemical and bacteriological weapons and ammunition, extremely harmful to health and life. Therefore, it is not proper to address the requirement of "reasonable legal alternatives" if there is no knowledge about the merits of Petitioners' claims regarding the clear and present danger of conducting military bombardments, even with inert bombs, on a zone that is only eight miles away from the civilian population and that has

been used for decades to test "life fire for most non-conventional weapons inventory" as it is admitted by the U.S. Navy in their web page.

It was not proper, nor responsible, to get to such a conclusion without an inspection of the documents and materials requested by Petitioners in their discovery. A legal alternative could be reasonable in some circumstances but the same legal alternative could also be extremely unreasonable or prejudicial in other circumstances, as in this case.

In the web site of the U.S. Navy, "One Stop Shopping", other foreign countries are invited to test "most non-conventional weapons inventory" in Vieques, which is a populated island with more than 9,300 inhabitants that are dying of cancer and other diseases directly related to the contaminants, pollution and poisons produced by the bombings and military maneuvers. The population lives only 8 to 12 miles away from the target range.

Due to this critical situation, a *subpoena duces tecum* against the Secretary of the Navy was necessary to produce all relevant documents concerning these activities which jeopardize the lives of the Viequenses. It was the Navy itself the one that published the availability of Vieques' Live Impact Area to test non-conventional weapons. For non-conventional weapons we understand chemical, biological and other kinds of dangerous weapons. This belief has not been refuted by the Government in any way. Therefore, this request cannot be considered as a fishing expedition, neither classified nor privileged.

According to *United States v. Nixon*, 94 S. Ct. 3090 (1974), these documents and information are evidentiary and relevant and they are not otherwise procurable reasonably in advance of trial by exercise of due diligence. There is no doubt that Petitioners could not properly prepare for trial without such production and inspection in advance. Moreover, the application has been made in good faith due to the information published on the internet by the U.S. Navy itself and due to their admission regarding the use of depleted uranium in the Vieques' Live Impact Area. Therefore, the *subpoena duces tecum* in this case complies with Rule 17(c) of the Federal Rules of Criminal Procedure.

In addition, the U.S. Supreme Court stated clearly in *United States v. Nixon*, supra, that the right of defendants to the production of all evidence at trial has constitutional dimensions. U.S. Const. Amends. 5, 6. Therefore, a mere confidentiality or immunity argument cannot prevail over a "fundamental demand of due process of law in fair administration of criminal justice." Thus, the documents are extremely relevant and important for the criminal defenses in this case and their denial violated the constitutional rights of Petitioners.

Petitioners claim that the rights comprehended in several international treaties that have been ratified by the U.S. constitute part of the law of the land of the United States and therefore, due to the flagrant violation of these treaties by the U.S. Navy actions in Vieques, Puerto Rico, Petitioners have the right to act in order to protect those fundamental human rights. That is the relevance of international human rights treaties when the

Government is the party that initiates the judicial process as in this criminal proceeding.

Petitioners raised as part of their defense of "state of necessity" that several international human rights treaties and instruments have been violated by the United States Government because of the U.S. Navy military maneuvers on the island of Vieques. Although the Government did not present any opposition to these claims, the district court denied the defense.

Since *The Paquete Havana*, 175 U.S. 677, 700 (1900), the Court held that "International Law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . . ". According to the U.S. Constitution, Art. VI, sec. 2, "All treaties made . . . under the Authority of the United States, shall be the Supreme Law of the Land . . . ". See also *Filartiga v. Pena-Irala*, 630 F.2d 876, 877-78 (2d Cir. 1980) and *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

Moreover, the Report submitted by the U.S. Government before the Committee Against Torture of the United Nations (CAT/C/28/Add.5) stresses that according to *Foster*, supra, the Convention Against Torture . . . does not require a domestic text of application.

On the other hand, the United Nations Human Rights Committee responded to the Report submitted by the U.S. Government (ICCPR/C/81/Add.4, 24 August 1994) stressing that: "The Committee regrets that members of the judiciary at the federal, state and local levels have not been fully aware of the obligations undertaken by the State party (U.S.A.) under the Covenant, and that judicial

continuing education programs do not include knowledge of the Covenant and discussion of its implementation." See ICCPR/C/79/Add. 50, p. 3, para. 15, 7 April 1995. This is one of the reasons why the U.S. Government was left outside of the U.N. Human Rights Commission recently. These treaties are also part of the Rule of Law in the U.S.

According to human rights international treaties invoked by Petitioners, "the United States did nothing to modify its international legal obligations under Article 2(3) of the ICCPR to provide remedies and an individual hearing." Similarly, if the United States did not intend "to comply with its obligations under Art. 6 of the *Race Convention* to provide remedies and an individual hearing, they could have attached a reservation to Art. 6, but they chose not to do so." The same happened with regard to the Torture Convention, Arts. 13 and 14. "The fact that the United States did nothing to modify its obligations to provide remedies and an individual hearing strongly suggests that the treaty makers intended to comply with those obligations." *See* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 Yale Journal of International Law 129, 191 (Winter-1999).

The best approach the U.S. courts could make to the implementation of human rights international treaties is to construe the non-self-executing declarations "as a general directive to the courts to interpret human rights treaty provisions so as to harmonize the treaties with constitutional, statutory and common law." *Id.*, p. 193. As stated by Chief Justice Marshall almost two hundred

years ago in *Marlbury v. Madison*, supra: " 'It is emphatically the province and duty of the judicial department to say what the law is'. That principle applies to treaties, just as it does to other laws." *Id.*

The statement that a treaty is not self-executing, in the sense that it does not create a private cause of action, does not mean that the treaty cannot be applied directly by the courts. It means that "courts could apply the treaty directly to enforce the rights of defendant in civil or criminal proceedings initiated by the government . . . permitting the treaty to be invoked defensively in that manner would be entirely consistent with the Administration's apparent objective of avoiding 'new avenues of litigation.' " *Id.*, pp. 152, 166, 170. Otherwise, the U.S. Government would not achieve one of its primary objectives of ratification: "The Treaty Compliance". Thus, the district court erred in not considering the international treaties.

The Vieques Choice: When any person is forced to an act of civil disobedience at Camp García in Vieques, the choice presented is whether to commit a violation of 18 U.S.C. sec. 1382, a Class B misdemeanor in the nature of a trespass or to seek the suspension or end of the destruction of an integral part of Puerto Rico society and the violation of our people's fundamental rights or to do nothing in violation of his conscience and collaborate with those who cause evil. At that point in time and space the question is nakedly posed, to defend himself, his rights and to defend others and their birthright, or to permit the greater evil.

To enter Camp García and reach the firing-zone (L.I.A.) means to stop bombardment euphemistically called to protect the U.S. national security, in spite of the obsolete character of these maneuvers. Those practices and the harm done to a civilian population is by far the greater of two evils. The specifics, which the Petitioners would have proved by competent evidence, are specified in Appellants' Brief before the court of appeals. Now is time for this Honorable Court to decide whether the District Court for the District of Puerto Rico and the U.S. Court of Appeals for the First Circuit have been denying Petitioners' rights to a due process of law and a fair and impartial trial according to the U.S. Constitution.

THEREFORE, Petitioners at bar respectfully request from this Honorable Court to issue the Writ of Certiorari and reverse the December 19, 2001 *Judgment* of the U.S. Court of Appeals for the First Circuit and the judgments and sentences therein appealed.

Respectfully submitted,

José J. Nazario de la Rosa
Fermín L. Arraiza Navas
867 D. Cabrera St.
– Santa Rita
San Juan, P.R. 00925
Tel.: (787) 758-0315
Fax: (787) 756-0315

Pedro J. Varela
HC-44, Box 13470
Cayey, P.R. 00736
Tel.: (787) 738-5345

Counsel for Petitioners